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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 73-74

POSTAL STEAMSHIP CORPORATION,
Petitioner,

vs.

STEAMSHIP EL ISLEO,
SOUTHERN PACIFIC COMPANY, CLAIMANT,
Respondent.

POSTAL STEAMSHIP CORPORATION;
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHAUNCEY I. CLARK,
BURTON H. WHITE,
Counsel for Respondent,
Southern Pacific Company.

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

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POSTAL STEAMSHIP CORPORATION,
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vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The petition is filed to review a decision of the Second Circuit Court of Appeals, affirming a final decree of the District Court for the Southern District of New York dismissing petitioner's libel, and affirming an interlocutory decree in favor of Southern Pacific Company, owner of steamship *El Isleo*, against the steamship *Eastern*

Glade. Both suits were to recover for damages resulting from a collision which occurred near the junction of Curtis Bay and Fort McHenry Channels in the approach to Baltimore Harbor in the late afternoon of December 19, 1935.

Facts

At about five P. M. on the evening of December 19, 1935, *El Isleo* left Sparrows Point Terminal, Baltimor bound for Ruckerts Terminal. As *El Isleo* proceeded up Fort McHenry Channel, when approximately abreast of Fort Carroll, the green side light of the *Eastern Glade* was sighted, about two miles away, on the port bow. The *Eastern Glade* was then proceeding down Curtis Bay Channel toward Fort McHenry Channel. In this situation the vessels were approaching on crossing courses. The *Eastern Glade* sounded a two-blast passing signal indicating an intention to continue on out of Curtis Bay Channel into Fort McHenry Channel, and across *El Isleo's* bow. *El Isleo* promptly answered with four blasts, followed immediately by one blast, indicating she intended to continue on up the Channel, and that the *Eastern Glade* should hold back and not attempt to emerge into Fort McHenry Channel until *El Isleo* had passed. However, the *Eastern Glade*, disregarding *El Isleo's* whistle signals, continued on, passed out of Curtis Bay Channel and into Fort McHenry Channel. As there was danger of collision, *El Isleo* put her rudder hard right and swung out of the channel on her own right side thereof. The *Eastern Glade* crossed Fort McHenry Channel and, continuing on, brought her bow into collision with *El Isleo* about amidships on the latter's port side (R. 36-9, 43, 67-8, 201-3, 265-9).

In the District Court petitioner contended that the collision occurred on the westerly side of Fort McHenry Channel, but both Courts below found that the collision occurred, as testified to by *El Isleo's* witnesses, outside of and to eastward of the channel (R. 39-41, 272-4, 360, 384).

The master of petitioner's vessel (*Eastern Glade*) admitted that he never intended the *Eastern Glade* to leave Curtis Bay Channel, and that the entrance of his vessel into Fort McHenry Channel was due to a "miscalculation" on his part (R. 227-8).

Petitioner does not seek exoneration of its own vessel. Indeed, petitioner admits the *Eastern Glade's* fault in failing to remain in Curtis Bay Channel, as her master concededly intended to do, until *El Isleo* had passed (Petition, 3).

There is no question of law involved

Petitioner bases its petition on a criticism of the decision of the Circuit Court of Appeals in approving the action of the privileged vessel (*El Isleo*) in a crossing situation, responding to the proposal of the burdened vessel (*Eastern Glade*) with an alarm signal, followed by a one-blast passing signal to indicate the refusal of the privileged vessel to yield the right of way to the burdened vessel.

Petitioner contends in effect that the privileged vessel is not privileged, and that although required to keep her course and speed in a crossing situation, the privileged vessel has no right to refuse to yield the right of way to the burdened vessel which sounds two blasts. There really is no question as to this once the facts have been established, which is the case here.

Although it was at first contended by petitioner (in the District Court) that the collision occurred in an entirely

different place than that found by the District Court and Circuit Court of Appeals, to wit: on the westerly side of the channel, and that *El Isleo* was at fault for being on her wrong side of the channel, this position was later abandoned and it was contended, as in this Court, that admitting the fault of petitioner's vessel for the collision, *El Isleo* was also at fault because she did not stop after sounding her danger signal, instead of going out of the channel in order to get out of the way of the *Eastern Glade*, which was clearly at fault for her navigation. Both Courts below resolved this against petitioner in accordance with the rules of navigation and the authorities interpreting those rules (R. 386).

Petitioner now attempts to upset the well established rule that in a crossing situation the privileged vessel (*El Isleo* here) not only may, but must hold her course and speed until it becomes evident that the burdened vessel either cannot, or will not, keep out of the way of the privileged vessel. As the Circuit Court of Appeals said:

"So viewed no fault appears in the navigation of *El Isleo*, the privileged vessel. To the two blast signal of the *Eastern Glade* Captain Korn responded with an alarm followed by one blast to indicate his refusal to yield his right of way. In *The Fulton*, 54 F. (2d) 467 we discussed the rule established in this circuit that in a crossing situation the privileged vessel may 'cross' the signal of the burdened vessel and hold her course and speed until it becomes evident that the burdened vessel either cannot or will not keep out of the way. Although the rule was criticized, we think it too firmly established to be departed from until the Supreme Court speaks. We still adhere to that view" (Opinion, R. 386).

We are not briefing the fault of petitioner's ship (*Eastern Glade*) the fault of that vessel being conceded (Petition, 4).

POINTS

I. The District Court and Circuit Court of Appeals were right in holding it to be a crossing situation under Articles 19, 21 and 22 of the Inland Rules of Navigation.*

In both Courts below petitioner contended that it was a case of special circumstances, and this has been petitioner's chief reliance throughout the case in its attempt to hold *El Isleo* partly at fault. Both Courts below pointed out that the contention was unfounded and that the cases relied upon did not sustain petitioner (R. 385).**

All agree that as *El Isleo* was proceeding up Fort McHenry Channel and *Eastern Glade* was proceeding down Curtis Bay Channel the *Eastern Glade* was showing *El Isleo* her green light only and *El Isleo* was showing *Eastern Glade* her red light only of her side lights (R. 43, 202-3; 265, 267).

Each was on a definite course and their courses were crossing so that *Eastern Glade* had *El Isleo* "on her own starboard side". In this situation, before any signals were sounded, the *Eastern Glade's* intended course was unknown to those on *El Isleo*. Only her apparent course was known to *El Isleo's* navigators, which was down Curtis Bay Channel toward the intersection of that channel with Fort McHenry Channel. The navigators of the *Eastern Glade* might have been intending to turn to the right and go down Fort McHenry Channel, or they might have

* Article 19. "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other" (33 U. S. C. § 204).

Article 21. "Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed" (33 U. S. C. § 206).

Article 22. "Every vessel which is directed by these rules to keep out of the way of another vessel shall if the circumstances of the case admit, avoid crossing ahead of the other" (33 U. S. C. § 207).

** This contention is now abandoned by petitioner.

been intending to cross Fort McHenry Channel and go to an anchorage on the easterly side of the channel, or they might have been intending to turn to the left and go up the channel in the same direction as *El Isleo*. The first of these possibilities; viz., turning to the right to go down Fort McHenry Channel, was eliminated by the *Eastern Glade's* two-blast signal, which meant to those aboard *El Isleo* that the *Eastern Glade* proposed to cross *El Isleo's* bow (R. 37, 52, 292). Indeed, the *Eastern Glade's* master admitted that his two-blast signal meant that he was going to cross *El Isleo's* bow (R. 229).

And the *Eastern Glade's* chief officer admitted that it was a crossing situation and that the *Eastern Glade* was bound to keep out of *El Isleo's* way. To use his own words, the *Eastern Glade* was required to "keep clear" of *El Isleo* (R. 113).

II. El Isleo was justified in keeping her course and speed.

In a crossing situation it is well established that it is not only the privilege and the right, but the *duty* of the privileged vessel (*El Isleo* was the privileged vessel) to keep her course and speed until a departure from the rules became necessary to avoid immediate danger. She could not stop or stop and reverse her engines because she would thereby be speculating upon what the burdened vessel would do. *El Isleo's* navigators were entitled to assume that the *Eastern Glade* would act lawfully and not fail in her duty to stop and reverse. *The Victory* and *The Plymothian*, 168 U. S. 410, 426.

If *El Isleo* were at liberty to speculate upon the possibility of the *Eastern Glade* failing to do her duty, the

certainty that the privileged vessel will hold her course (upon which the burdened vessel has a right to rely) and which it is the very object of the rules to insure, would give place to doubts on the part of the master of the burdened vessel and produce timidity and feebleness of action on the part of both which would bring about more collisions than it would prevent. *The Delaware,* 161 U. S. 459, 469; *The Boston,* 277 Fed. 36, 40 (C. C. A. 2); *The West Point,* 85 F. (2d) 63, 65 (C. C. A. 2); *The Piankatank,* 87 F. (2d) 806, 810 (C. C. A. 4); *The Boston Socony,* 63 F. (2d) 246 (C. C. A. 2); *The Elizabeth,* 197 Fed. 160 (C. C. A. 2); *The Florence,* 68 Fed. 940; affirmed, 89 Fed. 1015 (C. C. A. 2); *The Haida,* 191 Fed. 623; affirmed, 196 Fed. 1005 (C. C. A. 2); *The Newport,* 2 F. (2d) 255 (S. D. Cal.).

III. There was no fault on the part of El Isleo in refusing the Eastern Glade Permission to cross El Isleo's bow.

Petitioner's request for certiorari is premised almost entirely on the alleged failure of *El Isleo* to comply with Supervising Inspectors' Rules II and VII, which are inapplicable to the situation here. Indeed, this argument has not heretofore been a part of its case; it was not included in petitioner's allegations of fault in the pleadings (R. 4); nor was it argued or briefed in either of the Courts below.

The Congress has specifically provided by Rules 19, 21 and 22 of the Inland Rules of Navigation referred to above under Point I (this brief, p. 5) that when two vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other, and the privileged

vessel should maintain her course and speed. The applicable Inspectors Rule (Rule VII) confirms this provision, providing that in crossing situations:

"the steam vessel which has the other on her port side shall *hold her course and speed;* and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, if necessary to do so, slacken her speed or stop and reverse."

This rule deals specifically with the conduct of vessels in crossing situations and the signals to be given by them.

El Isleo's answer to the *Eastern Glade's* two-blast signal was a signal of four blasts, followed immediately by one blast, indicating her intention to "hold her course and speed" (R. 37, 268). The *Eastern Glade* replied with four blasts and one blast (R. 39, 269).* This meant that irrespective of the original signal, an agreement had been reached whereby the *Eastern Glade* would hold back and grant to *El Isleo* the privilege to which she was entitled, and it was in accordance with what the *Eastern Glade's* master testified he actually intended to do, to wit: remain in the channel (R. 228). Indeed, there is no claim that the *Eastern Glade* was in any way misled by *El Isleo's* signal. Nor can it be said that the collision in any way resulted from her so-called cross signal. On the contrary, the collision was due solely to the failure of the *Eastern Glade* to remain in Curtis Bay Channel, as she was required to do by the Navigation Rules. Any discussion of cross signals is of academic interest only.

It has been held again and again that when a vessel has no right to pursue a particular course without receiving the consent of the other vessel, the whistles which

* Her witnesses testified to three blasts.

she uses to obtain that assent are mere invitations to an agreement, contrary to the usual passing. The fact of signalling does not give the burdened vessel any special privilege, impose on the other vessel any special burden or reverse the normally applicable rules. The burden cannot be shifted from the burdened to the privileged vessel without her consent. *The West Point,* 85 F. (2d) 63 (C. C. A. 2); *Yamashita Kisen Kabushiki Kaisha* v. *McCormick Inter. S.S. Co.,* 20 F. (2d) 25 (C. C. A. 9); *The Ashley,* 221 Fed. 423 (C. C. A. 2); *The Scranton,* 221 Fed. 609 (C. C. A. 2); *The Haida,* 191 Fed. 623, affirmed 196 Fed. 1005 (C. C. A. 2); *The Montauk,* 180 Fed. 697 (C. C. A. 2); *The Pawnee,* 168 Fed. 371 (S. D. N. Y.); *The John H. Starin,* 162 Fed. 146 (C. C. A. 2); *The Cygnus,* 142 Fed. 85 (C. C. A. 2); *The Chicago,* 125 Fed. 712 (C. C. A. 2); *The George S. Shultz,* 84 Fed. 508 (C. C. A. 2); *The John King,* 49 Fed. 469 (C. C. A. 2); *The Edward S. Atwood,* 1925 A. M. C. 439 (E. D. N. Y.); *The Haven-Bernardsville,* 1925 A. M. C. 204 (S. D. N. Y.).

There is and can be no violation of the statutory rule in a vessel's giving a "cross signal" when the steamer first signalling has indicated an unauthorized manoeuvre or departure from the rules. *The Norfolk,* 297 Fed. 251 (D. Md.). In other words, the privileged vessel is entitled to assume that although the burdened vessel may first propose to exchange rights of way, it will, if such proposal be rejected, conform to the rules of navigation. *L. Boyers & Sons* v. *U. S.,* 195 Fed. 490 (C. C. A. 2).

Petitioner's contention amounts to a claim that Inspectors Rule 2 modifies the Navigation Rules imposing upon the privileged vessel the affirmative duty of "keeping her course and speed" (Rule 21, U. S. C., Title 33,

Section 206). That such was not the intention of the Inspectors Rules is indicated by the first part of Rule VII, dealing with crossing situations wherein the obligation of the privileged vessel to retain her course and speed is affirmed. The Inspectors could not have ruled otherwise, for no administrative body has any authority to repeal or modify any statute enacted by Congress. *The Pawnee*, 168 Fed. 371 (S. D. N. Y.).

The Fulton, 54 F. (2d) 667 (C. C. A. 2), relied upon by petitioner (Petition, pp. 4, 5, 7), did not involve a crossing situation, as in the instant case; it was a meeting or head-on situation where there is no privilege such as there is in a crossing situation, and there is for that reason a real basis for applying the Inspectors cross signal rule. As the Court there clearly stated:

"In a number of decisions involving crossing situations we have exonerated a vessel which pressed her statutory privilege by crossing the signal and holding her course and speed. * * * Our reasoning has been, that, as the statute (Inland Rules) article 21 (33 U. S. C. A. § 206), puts a duty upon the privileged ship to keep her course and speed, no rule can be valid which affects to relieve her of it, and that she may announce her determination to insist by crossing the first signal. The doctrine has been too long and too repeatedly established to allow any question now, but it is plain that the inspectors have never assented to it", (p. 468).

Also in *The Boston Socony*, 63 F. (2d) 246 (C. C. A. 2), the Court said:

"Rule 3 of the Supervising Inspectors Rules is relied upon as imposing a duty to signal; but in our opinion that rule cannot be construed as applying to vessels on crossing courses. Whether it would be valid if it were so construed, we need not say" (p. 248).

In *The Delaware*, 161 U. S. 459, this Court said of an alleged conflict between the Inspectors Rules and the International Rules:

"In this connection, the Talisman was charged with a violation of the Supervising Inspectors' rules, in not porting her helm and directing her course to starboard after sounding her first signal. These rules, however, so far as they require the whistle to be used, are applicable rather to vessels meeting end on or nearly end on, and the signals therein provided for are designed to apprise the approaching vessel of the intention of the steamer giving the signal, to port or starboard, as the case may be. As applied to vessels upon crossing courses, however, it means, when a single blast is given by the preferred steamer, nothing more than that she intends to comply with her legal obligation to keep her course, and throw upon the other steamer the duty of avoiding her. Such was evidently the view taken by both parties in this case, as there is not the slightest evidence that the pilot of the Delaware was misled by these signals, nor is a failure to port charged in the answer, or suggested in the testimony, as a fault on the part of the Talisman. These rules, so far as they require whistles to be used, ought to be construed in harmony with the International Code. If they were so construed as to require the preferred vessel to port, after having blown a blast of her whistle, it would involve a violation of article 23, which requires her to keep her course. On the other hand, if they be construed as applying chiefly to steamers meeting end on, or nearly end on, under Rule 18, they would frequently aid in solving any doubt with regard to the proposed course of the vessel giving the signal, and thus enable the meeting vessel to govern her own course accordingly. Certainly the rules should not be construed to require the steamer giving the signal to violate a plain statutory rule of navigation" (pp. 466-7).

The rule of Articles 19, 21 and 22 is of ancient origin, and its application is the very A. B. C. of practical navigation. *The George S. Shultz*, 84 Fed. 508 (C. C. A. 2). Any judicial refinement would not only slow up and interfere with normal traffic, but would also constitute a real

menace to navigation. This Court said with reference to Rule 19 in *The Breakwater*, 155 U. S. 252:

"Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24, which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or non-observance of a rule becomes a matter of doubt or discretion, there is manifest danger, for the judgment of one pilot may lead him to observe the rule, while that of the other may lead him to disregard it." (264).

This is not an instance of a blind following of judicial precedent in the face of changed conditions or a change in the public viewpoint. There is no particular moral significance in giving the privilege to the vessel having another on her port bow but it is important to have definite, well understood traffic rules at sea as well as ashore. If these rules are to accomplish their purpose rather than to add to confusion, they must be strictly enforced, as the Courts have enforced them in the past.

IV. El Isleo's navigators acted with reasonable prudence and skill under the circumstances.

Petitioner complains because *El Isleo* did not stop and back instead of swinging to starboard out of the channel in order to avoid collision (Petition, 2-3).

Both Courts below found that she was justified in choosing the course she did (R. 386). Of course, as in all collision cases where one vessel is privileged, as *El Isleo* was in the instant case, the time came when those aboard *El Isleo* were presented with two alternatives to avoid collision, viz., she could either stop and reverse or swing

to starboard out of the channel. *El Isleo* chose the latter alternative (R. 40, 49, 297). The propriety of *El Isleo* swinging hard right to avoid collision is hardly open to question. See *The Nordpol-Condor*, 84 F. (2d) 3 (C. C. A. 2). Indeed the *Eastern Glade's* master admitted that this was "just the right thing" to do (R. 234). And both Courts below found that *El Isleo* acted prudently under the circumstances (R. 386).

Having chosen this alternative (*i.e.*, to swing out of the channel under a right rudder) the greater her speed and the faster and farther she could get away from the *Eastern Glade*, which was coming into the channel from the opposite side, the better, and thus avoid the risk of collision and increase the possibility of avoiding it. Indeed, it was clear to *El Isleo's* master that he could have gained nothing by stopping as there was danger of sinking his ship by so doing (R. 42, 57). The manoeuvre adopted by *El Isleo* was in accordance with the rule prescribed by Admiral Knight for the avoidance of collision (Knight on Marine Seamanship, 9th Ed., p. 476). See *The Umbria*, 166 U. S. 404, 419; *The Hallgrim-Havre Maru*, 20 F. (2d) 720, 723 (C. C. A. 2); *The Nanuet-Poling Bros. No. 1*, 1931 A. M. C. 1598 (E. D. N. Y.); *The Manx Admiral*, 60 Lloyds List Law Reports 11.

The petition for certiorari should be denied.

Respectfully submitted,

CHAUNCEY I. CLARK,
BURTON H. WHITE,
Counsel for Respondent,
Southern Pacific Company.

Dated, New York, June 21, 1939.